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09/178,840	10/26/1998	ANGELIKI OSTE TRIANTAFYLLOU	P/2432-19	5038

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EXAMINER

SHERRER, CURTIS EDWARD

ART UNIT	PAPER NUMBER
1761	32

DATE MAILED: 06/28/2002

Please find below and/or attached an Office communication concerning this application or proceeding.

## Office Action Summary

Application No.  
09/178,840

Applicant(s)

Trianatafyllou

Examiner

Curtis E. Sherrer

Art Unit

1761



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

### Status

1)  Responsive to communication(s) filed on Apr 18, 2002.

2a)  This action is FINAL.      2b)  This action is non-final.

3)  Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

### Disposition of Claims

4)  Claim(s) 1-9, 11-14, and 21-25 is/are pending in the application.

4a) Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration.

5)  Claim(s) \_\_\_\_\_ is/are allowed.

6)  Claim(s) 1-9, 11-14, and 21-25 is/are rejected.

7)  Claim(s) \_\_\_\_\_ is/are objected to.

8)  Claims \_\_\_\_\_ are subject to restriction and/or election requirement.

### Application Papers

9)  The specification is objected to by the Examiner.

10)  The drawing(s) filed on \_\_\_\_\_ is/are a)  accepted or b)  objected to by the Examiner.  
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

11)  The proposed drawing correction filed on \_\_\_\_\_ is: a)  approved b)  disapproved by the Examiner.  
If approved, corrected drawings are required in reply to this Office action.

12)  The oath or declaration is objected to by the Examiner.

### Priority under 35 U.S.C. §§ 119 and 120

13)  Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)  All b)  Some\* c)  None of:

1.  Certified copies of the priority documents have been received.
2.  Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3.  Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\*See the attached detailed Office action for a list of the certified copies not received.

14)  Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).  
a)  The translation of the foreign language provisional application has been received.

15)  Acknowledgement is made of a claim for domestic priority under 35 U.S.C. §§ 120 and/or 121.

### Attachment(s)

1)  Notice of References Cited (PTO-892)      4)  Interview Summary (PTO-413) Paper No(s). \_\_\_\_\_

2)  Notice of Draftsperson's Patent Drawing Review (PTO-948)      5)  Notice of Informal Patent Application (PTO-152)

3)  Information Disclosure Statement(s) (PTO-1449) Paper No(s). \_\_\_\_\_      6)  Other: \_\_\_\_\_

**Art Unit: 1761**

**Part III DETAILED ACTION**

*Claim Rejections - 35 USC § 112*

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1-9, 11-14 and 24 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.
3. There is no antecedent basis for the phrase "the β-glucanase activity," as found in claim 1.
4. It is not clear how claim 6 further defines over claim 1.

*Claim Rejections - 35 USC § 102*

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless -

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claims 21, 22 and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by the Annual Report of Brewing Industry Research Foundation (Jnl. of The Institute of Brewing, <sup>1968</sup> ~~1986~~, pp 122-

37)(hereinafter the Report) in light of Scott (Jnl. of The Institute of Brewing, Vol. 78, No 2, pp. 179-86).

7. The Report details a study performed on green malts that were produced by malting them for as little as 48 hours. (Page 126, bottom). It was found that the resultant worts had a viscosity due to glucanase (page 127, second full paragraph). At the top of page 131, it is stated that "foam stability of the beers remained rather better than that of beers brewed from kilned malt although not as high as that of earlier beers of high viscosity." Therefore, foam stability is enhanced by high viscosity, high glucanase, beers.

8. Scott is relied upon to teach that which is inherent in the Report. Scott refers to the unkilned malts of the Report in the first column of page 179. Scott analyzes the amount of glucan found in worts that have been malted for 54 or 72 hours and then mashed at either a temperature of 45 then 65 C or just 65 C alone. See Table I. It can be seen that the shorter malting times produce the highest amount of glucan. Further, the mashing at 65 C alone also produces the highest amount of glucan. The highest occurs with the Zephyr barley variety, mashed at 65 C and malted for 54 hours.

9. It is assumed that because the worts of the Report in light of Scott have glucan amounts as claimed that they therefore inherently teach a process whereby "not more than 50% of soluble B-glucan" is eliminated. The Office does not have the facilities for examining and comparing applicants' product with the product of the prior art in order to establish that the product of the prior art does not possess the same material structural and functional characteristics of the claimed product. In the absence of evidence to the contrary, the burden is upon the applicant to prove that the claimed

**Art Unit: 1761**

inventions are functionally different than those taught by the prior art and to establish patentable differences. See *In re Best*, 562 F.2d 1252, 195 U.S.P.Q. 430 (CCPA 1977); *Ex parte Gray*, 10 U.S.P.Q.2d 1922, 1923 (BPAI).

***Claim Rejections - 35 USC § 103***

10. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

11. Claims 1-9, 11-14 and 21-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Kong *et al.* (CN Pat. No. 1065488)(hereinafter Kong) in view of Lindahl (WO95/07628) for the reasons set forth in the last Office Action.

12. Claims 1-9, 11-14 and 21-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over the Annual Report of Brewing Industry Research Foundation (Jnl. of The Institute of Brewing, 1986, pp 122-37)(hereinafter the Report) in light of Scott (Jnl. of The Institute of Brewing, Vol. 78, No 2, pp. 179-86) in view of applicants' admissions (Page 1 of specification).

13. The Report in light of Scott teaches that cited above but does not disclose containing 10 to 30% or the treated cereal or the mixing times. It would have been obvious to those of ordinary skill

**Art Unit: 1761**

in the art to utilize any amount of the treated cereal because brewers typically modify the recipes for beers to obtain new and different products. See *In re Levin*.

14. Applicants admit, on page 1 of their specification, that "water soluble native B-glucan is of major nutritional interest. It is the chemical constituent of 'soluble dietary fiber,' SDF, considered to be responsible for the association between oats products and reduced risk for coronary heart disease. . . . A variety of health food products rich in SDF are currently on the market." Applicants also state that "barley and other cereals contain SDF." Therefore, it would have been obvious to those of ordinary skill in the art to produce a wort rich in B-glucan so as to produce a healthy beverage.

***Response to Arguments***

15. Applicants' arguments filed 04/18/02 have been fully considered but they are not found persuasive.

16. Applicants argue that Kong does not refer to the reduction in β-glucanase activity or that any ingredient employed in the process will not decrease soluble β-glucanase activity more than 20% by weight. The fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985).

17. With respect to the secondary reference, Lindahl, applicants argue that the Examiner agreed that Lindahl would not be usable in a 103 obviousness rejection. In reviewing the Interview Summary

**Art Unit: 1761**

record, it appears that Lindahl was being removed for the purposes of an obviousness rejection as a primary or sole reference.

*Conclusion*

18. No claim is allowed.
19. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

20. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Curtis Sherrer whose telephone number is (703) 308-3847. The examiner can normally be reached on Tuesday through Friday from 6:30 to 4:30. The **fax phone number** for this Group is (703)-305-3602.

**Serial Number: 09/178,840**

7

**Art Unit: 1761**

21. Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0661.



Curtis E. Sherrer  
Primary Examiner  
June 27, 2002